ELECTRONICALLY FILED DEC 02, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 16-1080

CITY OF DES MOINES, IOWA,
Plaintiff-Appellee,

v.

MARK OGDEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE ROBERT B. HANSON

APPELLEE'S PROOF BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF ISSUES

I. Mr. Ogden has lost the right to operate Oak Hill Mobile Home Park as a legal non-conforming use.

City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008)

Spencer Diesel Injection & Turbo, Inc. v. City of Sioux City, 735 N.W.2d 202 (Table) (Iowa 2007)

Easter Lakes Estates, Inc. v. Polk County, 444 N.W.2d 72 (Iowa 1989)

Des Moines Municipal Code § 134-947(c)

Iowa Arboretum, Inc. v. Iowa 4-H Foundation, __ N.W.2d __, __, 2016 WL 6351611 (Iowa 2016)

Classon v. Classon, 786 N.W.2d 873 (Table) (Iowa Ct. App. 2010)

City of Jewell Junction v. Cunningham, 439 N.W.2d 183 (Iowa 1989)

Perkins v. Madison County Livestock & Fair Ass'n, 613 N.W.2d 264 (Iowa 2000)

City of Central City v. Knowlton, 263 N.W.2d 749 (Iowa 1978)

Crow v. Bd. of Adjustment of Iowa City, 288 N.W. 145 (Iowa 1939)

Bd. of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497 (Iowa 1972)

II. Mr. Ogden has not met his burden to show the City is estopped from enforcing its zoning ordinances.

City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008)

Giza v. BNSF Ry. Co., 843 N.W.2d 713 (Iowa 2014)

Spencer Diesel Injection & Turbo, Inc. v. City of Sioux City, 735 N.W.2d 202 (Table) (Iowa 2007)

Sullivan v. Chicago & NW Transp. Co., 326 N.W.2d 320 (Iowa 1982)

Bailiff v. Adams County Conference Bd., 650 N.W.2d 621 (Iowa 2002)

Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't, 265 S.W.3d 190 (Ky. 2014)

City of Marshalltown v. Reyerson, 535 N.W.2d 135 (Iowa Ct. App. 1995)

Anita Valley, Inc. v. Bingley, 279 N.W.2d 37 (Iowa 1979)

III. The Court should not grant Amici's requested relief.

The New Lexicon Webster's Dictionary of the English Language (Bernard S. Cayne et al. eds., 1989 ed.)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it presents issues of applying existing legal principles. Iowa R. App. P. 6.1101(3)(a). While Mr. Ogden argues this case presents a substantial issue of first impression, there is no explanation in the routing statement or elsewhere in his brief explaining what issue of first impression is involved. There is also no substantial question of enumerating or changing legal principles as there is no argument in Mr. Ogden's brief that any law should be changed. Neither does this case raise a fundamental and urgent issue of broad public importance.

STATEMENT OF THE CASE

The City agrees with much of Mr. Ogden's Statement of the Case. The City disagrees with this statement: "In its Petition, the City contended that the Mobile Home Park is an illegal use, because it does not conform to current zoning district regulations." (Ogden Brief, p.1.) While the City alleged in the Amended Petition that the property at 3140 Indianola Avenue did not comply with existing zoning regulations, the Amended Petition also addressed violation of zoning regulations that existed in 1955 through attachment and incorporation of an August 5, 2014 letter detailing current violations of the 1955 ordinances. (Amended Petition, ¶11 App. 002.)

In addition to Mr. Ogden's Statement of the Case, the City notes several additional matters related to this proceeding.

During discovery, the City served on Mr. Ogden two requests for admission. Despite Mr. Ogden's denials, the trial court deemed the requests for admission admitted. As a result, the City's request "2. Mobile or manufactured homes are not permitted in C2 or R1-60 zoned areas under the presently existing Des Moines Zoning Ordinance" was deemed admitted. (Order Compelling Discovery and Imposing a Sanction, App. 017.)

On September 14, 2015, the City designated SuAnn Donovan as an expert witness regarding zoning matters. (Plaintiff's Designation of Experts, App. 019.)

On March 11, 2016, the City filed a Second Motion in Limine. The City requested that the Court exclude testimony from any residents of the mobile home park at 3140 Indianola Avenue as their testimony was unlikely to relate to zoning matters and because they were not disclosed in discovery. (City's Second Motion in Liminie, ¶¶1-5 App. 021-022.)

STATEMENT OF FACTS

The property commonly known as 3140 Indianola Avenue has existed within the City of Des Moines for many decades. The property once had the address of 3162 Indianola Avenue. (Trial Transcript ("Tr.") Donovan, p.27 lines 17-23 App. 140.) The earliest available records indicate the property was used for a heating and furnace repair business in 1938 and 1939. (Tr. Donovan, p.26 lines 8-9 App. 139.) In 1941, the use changed to that of a tourist camp. (Tr. Donovan, p.26 lines 10-11 App. 139.) A 1947 aerial photo shows use of the property as a tourist camp. (Findings of Fact, Conclusions of Law, and Ruling "Ruling" p.2 App. 270; Ex. 7 App. 071; Tr. Donovan, p.29 Lines 10-21 App. 142.)

The use of the property changed in 1955. The southeast corner of the property was split off and kept the 3162 Indianola Avenue address. (Tr. Donovan, p.27 Line 17-p.28 Line 5 App. 140.) The remainder of the property was renumbered 3140 Indianola Avenue and began being used as Oak Hill Mobile Home Park. (Tr. Donovan, p.28 Lines 4-5, p.26 Lines 11-12 App. 139,137.)

On March 7, 1955, a certificate of occupancy was issued which authorized use of 3140 Indianola Avenue as a mobile home park. (Ex. 10, App. 087.) The certificate read: "C/O Trailer Court in R-2 (Non-conforming) C-2 and R-2." (Ex. 10, App. 087.) Ms. Donovan testified this indicates that the portion zoned C-2 was a use

compliant with ordinances, but that the portion of the property zoned R-2 was a non-conforming use. (Tr. Donovan, p.34 Lines 6-18 App. 147.)

Several sets of ordinances in 1955 pertained to mobile home parks. Des Moines code section 2A-49 provided that a certificate of occupancy was not to be issued unless the property was used in compliance with City ordinances. (Ex. 8, p.5 App. 076.) Des Moines code chapter 2A required 35 foot setbacks from roads, 15 foot setbacks for side yards, and 40 foot setbacks for rear yards. (Ex. 8, p.3 App. 074.) Des Moines code section 2A-49 provided that non-conforming uses would be allowed to continue "unless a discontinuance is necessary for the safety of life or property." (Ex. 8, p.5 App. 076.) Des Moines code chapter 57 required clearance of at least 12 feet between each trailer, access to a driveway at least 20 feet in width, and walkways of at least two feet in width from each trailer space to the roadway. (Ex. 9, pp.2-4 App. 084-086.)

Mr. Ogden's uncle, Richard L. Clark, purchased Oak Hill Mobile Home Park sometime between 1974 and 1976. (Tr. Ogden, p.92 Lines 17-22 App. 205.) Mr. Ogden mowed grass and did other work there after Mr. Clark purchased it. (Tr. Ogden, p.92 Lines 18-20 App. 205.) Mr. Ogden became actively involved in management of Oak Hill in September 1999. (Tr. Ogden, p.92 Line 25-p.93 Line 2 App. 205-206.) Mr. Ogden became title holder of 3140 Indianola Avenue in 2013. (Ex. 2, App. 291-292.)

The owners of 3140 Indianola Avenue have continued its use as Oak Hill Mobile Home Park to the present. A 1963 aerial photo shows many mobile homes in a markedly different layout than the 1947 aerial photo. (Ruling, p.3 App. 271; Ex. 11 App. 088.) Recent aerial photos show that the layout today is substantially the same as in 1963. (Ruling, p.3 App. 271; Ex. 3 App. 025; Ex. 19, App. 100.) Its continued use as a mobile home park is not compliant with present City ordinances. (Order Compelling Discovery and Imposing a Sanction, App. 013-018.)

The condition of 3140 Indianola Avenue is also not compliant with the 1955 ordinances. The owners have maintained the property in violation of the 1955 setback requirements on all sides. (Tr. Donovan, p.58 Line 22-p.59 Line 15 App. 171-172.) There are at least twenty violations of the requirement that there be twelve feet separating trailers. (Ex. 19, App. 100; Tr. Donovan, p.59 Line 20-p.63 Line 11 App. 172-176.) The driveway through Oak Hill is also narrower than required by the 1955 ordinance. (Tr. Donovan, p.59 Lines 16-19 App. 172; Ex. 18, App. 096-099.)

Oak Hill Mobile Home Park today has more vehicles parked near mobile homes, more mobile homes with additional structures built on, and more miscellaneous debris and sheds than in 1963. (Ruling, p.3 App. 271.) The extra structures reduce the distance between mobile homes. (Ruling, p.4 App. 272.) "Many of the plots also contain items such as fences, container gardens, bicycles,

children's toys, grills, large refuse items (including … a truckload of tires), and metal and plastic bins." (Ruling, p.4 App. 272.)

There is a greater danger from fire and from fires spreading when buildings are closer together rather than further apart. (Tr. Lund, p.10 Lines 12-22 App. 123.) The City currently requires properties to have twenty foot wide fire access roads. (Tr. Lund, p.10 Line 23-p.11 Line 2 App. 123-124.) This helps firefighters respond to emergencies. (Tr. Lund, p.11 Lines 2-10 App. 124.) Narrower roads make fighting fires harder. (Tr. Lund, p.11 Lines 13-16 App 124.)

ARGUMENT

The Court should affirm the rulings of the district court. Mr. Ogden has lost the right to operate a mobile home park at 3140 Indianola Avenue as a legal non-conforming use. As the district court ruled, the non-conforming use should be ended because Oak Hill Mobile Home Park is a threat to health and safety. Expansion of the mobile home park from 1955 to the present has eliminated the property's compliance with 1955 zoning ordinances under which it was an approved use. As such, it is not a legal non-conforming use. Mr. Ogden's has not proven his estoppel defense as he did not meet his burden to show either that estoppel should apply to the City or that he met the elements to prove estoppel if it did.

I. Mr. Ogden has lost the right to operate Oak Hill Mobile Home Park as a legal non-conforming use.

A. Issue Preservation

Mr. Ogden did not preserve the argument that the City has engaged in an unconstitutional taking. In his proof brief, Mr. Ogden argues that the City's action constitutes an uncompensated taking unless the City can show that Oak Hill Mobile Home Park was a public nuisance. (Ogden Brief, pp.26-28.) This argument is not preserved because Mr. Ogden failed to present it to the district court. Mr. Ogden only argued in district court filings that non-conforming use laws exist to avoid uncompensated takings, (Proposed Ruling, pp.8-9 App. 260-261;) he did not argue

that the City's action constituted a taking. The Court should not consider that portion of Mr. Ogden's proof brief.

The remainder of this issue has been preserved.

B. Scope and Standard of Review

As a matter tried in equity, the Court's review is de novo. *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 59 (Iowa 2008). The Court gives "weight to the fact findings of the district court, especially as to the credibility of witnesses, but [is] not bound by them." *Id.* (internal citation and quotation omitted).

Mr. Ogden argues that review is entirely de novo because the case implicates constitutional principles. (Ogden Brief, pp.14-15.) This is inaccurate. That an underlying right derives from the constitution does not change the established standard of review. *Spencer Diesel Injection & Turbo, Inc. v. City of Sioux City*, 735 N.W.2d 202 (Table), at *2 n.2 (Iowa 2007). Just as the right to just compensation in a condemnation proceeding was constitutionally protected but reviewed for errors of law in *Spencer*, the established standard of review for non-conforming use matters includes deference to district court factual findings.

C. Argument

The Court should affirm the district court ruling that Mr. Ogden has lost the right to continue the non-conforming use of 3140 Indianola Avenue as a mobile home park.[1] Two theories support this conclusion. First, the district court found that the conditions of Oak Hill Mobile Home Park have become such that it is a health and safety hazard to residents, firefighters, and police officers. The applicable zoning laws from 1955 indicate that the non-conforming use can be discontinued.

Second, the Court can affirm because use of the property as a mobile home park has been expanded beyond what was lawfully allowed in 1955. Mr. Ogden has lost the right to continue the non-conforming use.

Initially, the City notes that Mr. Ogden misstates the scope of the rights at issue. Mr. Ogden argues this case involves vested legal rights both of himself and all of the mobile home owners who reside in Oak Hill Mobile Home Park. (Ogden Brief, p.15.) Mr. Ogden is the only person who potentially has non-conforming use rights regarding the application of the City's zoning ordinances to 3140 Indianola Avenue. He is the title holder for the property, not the other residents. The City's zoning ordinances apply to the real estate and the owner of the real estate. The other

[1] It is likely that the right to continue the non-conforming use of the property as a mobile home park was lost before 2013 when Mr. Ogden became title holder. For simplicity, the City refers only to Mr. Ogden having kept or lost these rights. As the successor in interest of the previous owners he has inherited their rights or lack thereof.

residents only have an interest in personal property stored on the real estate. Their right to do so is temporary and subject to Mr. Ogden's right to use the land how he sees fit. At any time, Mr. Ogden could choose not to renew the leases of the other park residents and use the property for something different. The legal scope of the zoning dispute involves only the City and Mr. Ogden. Mr. Ogden's arguments regarding the rights of the other mobile home residents are misplaced.

1. Mr. Ogden lost the right to continue the non-conforming use because Oak Hill Mobile Home Park is a health and safety hazard.

The conditions at Oak Hill Mobile Home Park constitute a health and safety hazard to residents and emergency responders. The Des Moines zoning ordinance that existed when the 1955 certificate of occupancy was issued provided that non-conforming uses would be ended if "necessary for the safety of life or property." (Ex. 8, p.5 App. 076.) The district court appropriately held this provision applied to Oak Hill because it is a health and safety hazard.

The conditions at Oak Hill present several dangers to the community. The evidence shows that the residents of Oak Hill are at increased danger from fire. Des Moines Fire Marshall Jonathan Lund testified that buildings face greater danger from fires if closer together rather than further apart. (Tr. Lund, p.10 Lines 12-22 App. 123.) It is easier for fire to spread between buildings that are closer together. Oak Hill is packed with close together trailers that are not even twelve feet apart as

required by 1955 ordinances. (Tr. Donovan, p.59 Line 20-p.63 Line 11 App. 172-176.) There are several spots where trailers are separated by three feet or less. (Ex. 19, App. 100; Tr. Donovan, p.61 Lines 12-13, 21-23 App. 174.) Additionally, Oak Hill has been filled with flammable material like "fences, container gardens, bicycles, children's toys, grills, large refuse items (including … a truckload of tires), and metal and plastic bins" that would bridge the gaps between trailers (Ex. 15, p.1 App. 092; Ex. 17, p.2 App. 095; Ruling, p.4 App. 272.) The congestion and clutter of Oak Hill means that if one mobile home were to start on fire, it would be easy for that fire to travel to many other trailers.

It would also be difficult for firefighters to respond to a fire or other emergency at Oak Hill because of the narrow driveway. Mr. Lund testified that twenty foot wide access roads are required to assist the department in fighting fires and responding to medical emergencies. (Tr. Lund, p.10 Line 23-p.11 Line 16 App. 123-124.) This is also the width of access drive required by the ordinances in effect in 1955. (Ex. 9, p.2 App. 084 Sec 57-6(c).) The access drive through Oak Hill is not twenty feet wide. (Ex. 18, App. 96-99; Tr. Donovan, p.59 Lines 16-19 App. 172.)

All of this creates a situation where a fire or ambulance call would be dangerous to residents and firefighters. If a fire occurs, not only would it be easier than planned for in the 1955 ordinances for a fire to spread, but firefighters would

face more difficulty and danger because they could not maneuver their vehicles into Oak Hill.

The structural and property congestion in Oak Hill would also make responding to an emergency or crime more difficult and dangerous for police officers. (Ruling, pp.13-14 App. 281-282.) Because of these health and safety dangers, not only to the residents of Oak Hill but also to first responders, discontinuance of the non-conforming use for this property is appropriate under the ordinances in effect when the certificate of occupancy for Oak Hill was issued in 1955. This Court should affirm the district court's finding that the health and safety dangers have eliminated the right to continue the non-conforming use of 3140 Indianola Avenue as a mobile home park.

Affirming the district court will not work an uncompensated taking on Mr. Ogden. In his proof brief, Mr. Ogden argues that the City's action amounts to a taking because it has not shown that Oak Hill is a nuisance. Initially, the Court should not consider this argument as it was not preserved for appeal. Even assuming it was, no taking has occurred. At minimum, a taking would require the City to "substantially deprive[] a person of the use of property." *Easter Lakes Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75 (Iowa 1989). That has not occurred here. Even if Mr. Ogden cannot use the property as a mobile home park, he could put the property to any other use authorized by the City's zoning ordinances. There are over

forty specifically authorized uses of the majority C-2 portion of 3140 Indianola Avenue. Des Moines Municipal Code § 134-947(c). There are many ways Mr. Ogden could use the property other than as a mobile home park.

There also can be no taking because Mr. Ogden lost his right to continue using the property as a mobile home park. Mr. Ogden complains that the City is taking a vested legal right to continue the mobile home use of 3140 Indianola Avenue. The City cannot take from Mr. Ogden a right he no longer had. Because Oak Hill has become a public safety hazard or because it has expanded beyond its lawful non-conforming use, as discussed in the next section, Mr. Ogden no longer has a legal right to continue operating a mobile home park. The City cannot take a right Mr. Ogden no longer possessed.

2. Mr. Ogden lost the right to use the property as a mobile home park because its use and layout today is inconsistent with the 1955 ordinance.

The argument in this section was presented to, but not adopted by, the district court. This Court may rely on it as a case may be affirmed on grounds not relied on by the trial court if those grounds were presented. *Iowa Arboretum, Inc. v. Iowa 4-H Foundation*, __ N.W.2d __, __, 2016 WL 6351611, at *10 (Iowa 2016); *Classon v. Classon*, 786 N.W.2d 873 (Table), at *3 (Iowa Ct. App. 2010).

The use of 3140 Indianola Avenue violates Des Moines' zoning ordinances. It is the City's burden to prove a current zoning violation exists. *City of Jewell*

Junction v. Cunningham, 439 N.W.2d 183, 186 (Iowa 1989). Once this is proven, the party asserting that a lawful non-conforming use exists must establish "the lawful and continued existence of the use." *Id.* The burden then shifts back to the zoning entity to prove the established nonconforming use has been exceeded. *Id.*

"A non-conforming use is one that existed and was lawful when the zoning restriction became effective and which has continued to exist since that time." *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 270 (Iowa 2000) (internal quotes and citation omitted). Nonconforming uses may not be enlarged or extended, and "[a] property owner may lose the protection of nonconforming-use status when the property owner exceeds the established nonconforming use." *Id.* (internal quotes and citation omitted).

The City has established that a current zoning violation exists. The Court's June 11, 2015 Order deemed admitted statements that establish 3140 Indianola Avenue today is zoned R1-60 and C-2 and that use of property in those districts for a mobile home park is unlawful. The City has met its burden to show violations of current zoning ordinances. This shifts the burden to Mr. Ogden to show that a non-conforming use exists that was lawful at some time. Assuming this is established, the burden returns to the City to establish that the lawful use has been exceeded.

The record in this case could be interpreted in two ways. The most persuasive evidence is that the property at 3140 Indianola Avenue complied with existing

zoning laws, in the C-2 portion, when the Certificate of Occupancy was issued in 1955, and the layout of the park was later expanded beyond what was lawful at that time. Alternatively, the evidence does not make it impossible that Oak Hill Mobile Home Park was never compliant with the zoning requirements for mobile home parks, even when the Certificate of Occupancy was issued. Neither scenario would give Mr. Ogden a legal right to continue the use of the property as a mobile home park that violates the 1955 ordinances. Under the first scenario, Mr. Ogden lost the right to continue the mobile home park use when the use was expanded into setbacks and when trailers were squeezed closer together than allowed in 1955. Under the second scenario, the configuration of the mobile home park was not compliant with the ordinances in effect in 1955. If that is true, then the Certificate of Occupancy was invalid when issued, and Mr. Ogden cannot meet his burden of show that the mobile home use ever complied with existing ordinances.

a. Mr. Ogden lost the right to continue use of 3140 Indianola Avenue because of unlawful expansion of that use.

The most persuasive evidence is that the use of 3140 Indianola Avenue as a mobile home park in 1955 conformed to then existing zoning ordinances. The 1955 certificate of occupancy meets Mr. Ogden's burden of proof to show a lawful use existed. The 1955 Certificate of Occupancy authorized use of 3140 Indianola Avenue as a mobile home park and indicates that the C-2 portion of the property was

a conforming use. (Tr. Donovan, p.80 Line 19-p.81 Line 1 App. 193.) The ordinances in effect at that time indicate that a certificate of occupancy was not to be issued unless the proposed use of the property was lawful. (Ex. 8, p.5 App 076 2A-49.) This likely establishes that in 1955 the property complied with the requirements applicable to mobile home park use. Mr. Ogden accepts this position when he states that the Certificate of Occupancy establishes that the C-2 portion of the property "was being operated as a legal conforming use under the C-2 regulations in effect in 1955." (Ogden Brief, p.18. Also, Ogden Brief, p.6.)

Today, Oak Hill Mobile Home Park does not comply with the requirements for such a use set out in the 1955 ordinances. The City's evidence demonstrates multiple violations of the setback, driveway, and clearance between trailer requirements. (Tr. Donovan, p.39 Line 3-p.63 Line 11 App. 152-176; Ex. 6, pp.2-4, 10, 14-15, 21-24, 27-30, 34-37 App. 033-034,041,045-046,052-055,058-061,065-068; Ex. 13, App. 089-090; Ex. 14, App. 091; Ex. 15, pp.1-2 App. 092; Ex. 16, App. 093; Ex. 17, pp.1-2 App. 094-095; Ex. 18, pp.1-4 App. 096-099; Ex. 19, App. 100.) This establishes that sometime between 1955, when the use was compliant, and today, the use of the property enlarged beyond what was lawfully allowed in 1955. The property has lost its right to continue as a lawful nonconforming use.

The existence of zoning and mobile home park laws in 1955 is significant. Mr. Ogden argues that a mere intensification of use cannot cause the loss of

nonconforming use status. Mr. Ogden points to prior cases in which a nonconforming use existed before any zoning laws were enacted and could then intensify despite zoning laws. *Okoboji Barz*, 830 N.W.2d 30; *Jewell Junction*, 439 N.W.2d; *City of Central City v. Knowlton*, 263 N.W.2d 749 (Iowa 1978). None involved a use that commenced when zoning laws already existed. In all three cases, the nonconforming use began before any zoning laws existed. The municipality could not point to any way in which the intensified use violated the zoning laws that existed when the landowners commenced their respective uses, because there were no applicable regulations when the uses began. Here, ordinances already existed governing the zoning of 3140 Indianola Avenue and mobile home parks in Des Moines when Oak Hill Mobile Home Park began operation in 1955. It now exceeds what was then lawful. It could not have lawfully existed in 1955 as it exists today. No similar statement could be made about the properties in the cases cited by Mr. Ogden because those properties were not regulated when the nonconforming uses began. The expansion of Oak Hill Mobile Home Park beyond what was lawful in 1955 has caused it to lose its right to continue as a nonconforming use.

b. Alternatively, use of 3140 Indianola Avenue as a mobile home park cannot be continued because it was never a lawful use.

No lawful nonconforming use would exist today if the property did not comply in 1955. Mr. Ogden argues that the layout of Oak Hill Mobile Home Park today is the same as it was in 1955 and in 1939. (Ogden Brief, pp.17, 24.) If the layout of the property was not compliant with zoning ordinances in 1955, Mr. Ogden cannot meet his burden to show the use of the property as a mobile home park was ever lawful. Without establishing a lawful use at some point in the past, there is no basis for continuing use of 3140 Indianola Avenue as a mobile home park.

The *Crow* case is inapplicable under this theory. Mr. Ogden argues that the owners of 3140 Indianola Avenue acquired a vested right to continue using the property as a mobile home park when the certificate of occupancy was issued in 1955. In 1939, the Iowa Supreme Court held that the lawful issuance of a building permit was not revocable once the permittee had acted and incurred expense as a result. *Crow v. Bd. of Adjustment of Iowa City*, 288 N.W. 145, 146 (Iowa 1939). However, this does not "apply if the building permit was not legally granted." *Id.* In a more recent case, *Crow* was found inapplicable because a permit was invalid at its inception. *Bd. of Adjustment of City of Des Moines v. Ruble*, 193 N.W.2d 497, 507 (Iowa 1972). If Mr. Ogden is correct that the layout of the property was identical in 1955 to the present, then the certificate of occupancy was invalid when issued. The property did not meet the ordinance requirements in 1955 and the ordinances

indicated that certificates of occupancy would not be issued if the property was not compliant. If the property was not compliant in 1955, then Mr. Ogden could not have gained a vested right from the invalidly issued certificate of occupancy.

Mr. Ogden also cannot show a prior lawful use as a mobile home park because the property does not comply with any ordinance that existed before 1955. Mr. Ogden argues that the property has been used as a mobile home park since 1939. This is not supported by the evidence. The only evidence a mobile home park use began in 1939 is the historical information put into the Polk County Assessor's website at some later date in time. Ms. Donovan examined directories produced in 1939 through 1955 indicating that the property was used for furnace repair in 1939, then as a tourist camp from 1941-1954. (Tr. Donovan, p.26 Lines 8-12 App. 139.) This is corroborated by the 1947 aerial photo which shows use of the property as a tourist camp rather than a mobile home park. (Ex. 7, App. 071; Tr. Donovan, p.29 Lines 1-21 App. 139.) Ms. Donovan's expert opinion was that the directories she reviewed were a more reliable source of historical information than the Polk County Assessor's website. (Tr. Donovan, p.68 Lines 6-21, p.69 Lines 3-8, p.71 Lines 7-22 App. 181,182,184.) Mr. Ogden presented no other evidence that the mobile home use began before 1955. He could not testify to that himself because his knowledge of the use could not extend back further than 1966 when he was born. (Tr. Ogden, p.108 Line 25-p.109 Line 2 App. 221-222.)

No use of the property as a mobile home park beginning between 1947 and 1955 could have been lawful. The property could not have been lawfully used as a mobile home park in 1941 because the City's ordinances prohibited use of trailers as permanent habitations unless they met building codes. (Ex. 23, p.5 App. 110.) The City's 1950 ordinance required sanitation facilities which there is no evidence ever existed. (Ex. 24, App. 112.)

If the certificate of occupancy did not establish that the property complied with 1955 zoning ordinances, in a layout that had to have been changed before 1963, then Mr. Ogden cannot prove there was ever a lawful use of the property as a mobile home park. The 2003 letter does not change this. Exhibit 21 is a letter regarding use of the property as an auto dealership. Mr. Ogden argues this letter establishes that use of the property as a mobile home was accepted and allowed by zoning as of 2003. It does not. The mobile home park use of the property is discussed only briefly in a letter that focuses otherwise exclusively on use of the property for auto sales. (Ex. 21, App. 104.) The letter does not say that the mobile home use was compliant in 2003, was a lawful nonconforming use in 2003, or even that the use was compliant in 1955. It only acknowledges that a certificate of occupancy for the mobile home use was issued in 1955 and expresses no opinion on the validity of the certificate in 1955 or 2003. This letter establishes no lawful use of the property as a mobile home park.

Under any view of the evidence, the Court should affirm the district court because Mr. Ogden no longer has a right to a non-conforming use of 3140 Indianola Avenue as a mobile home park. The most persuasive evidence is that the layout of the park complied with City ordinances in 1955, but was later changed so it was no longer compliant with the 1955 ordinances. If true, Mr. Ogden has met his burden to show there was once a lawful use, but the City has also met its burden to show he has lost the right to continue that use. Alternatively, if the layout was not compliant with existing ordinances in 1955, then the Certificate of Occupancy was invalid when issued. If true, Mr. Ogden cannot meet his burden to show that use of the property as a mobile home park was ever lawful. Under either scenario, this Court should find that Mr. Ogden does not have the right today to use the property as a legal non-conforming mobile home park.

II. Mr. Ogden has not met his burden to show the City is estopped from enforcing its zoning ordinances.

A. Issue Preservation

Mr. Ogden preserved error on this issue in general, but he has not preserved error on the exclusion of certain of Mr. Ogden's testimony. The district court excluded Mr. Ogden's testimony regarding encounters he had with City employees in 1999 and 2001. Despite its exclusion, Mr. Ogden relies on that testimony but does not try to argue it should not have been excluded.

B. Scope and Standard of Review

As a matter tried in equity, the Court's review is de novo. *Okoboji Barz*, 746 N.W.2d at 59. The Court gives "weight to the fact findings of the district court, especially as to the credibility of witnesses, but [is] not bound by them." *Id.* (internal citation and quotation omitted).

The district court's evidentiary rulings are reviewed for abuse of discretion. *Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 718 (Iowa 2014). "A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable. The grounds for a ruling are unreasonable or untenable when they are based on an erroneous application of the law. Therefore, under our abuse-of-discretion standard, we will correct an erroneous application of the law." *Id.* (internal citation and quotation omitted).

Mr. Ogden argues that review is entirely de novo because the case implicates constitutional principles. (Ogden Brief, p.28.) This is inaccurate. That an underlying right derives from the constitution does not change the established standard of review. *Spencer Diesel*, 735 N.W.2d at *2 n.2. Just as the right to just compensation in a condemnation proceeding was constitutionally protected but reviewed for errors of law in *Spencer*, the established standard of review for non-conforming use matters includes deference to district court factual findings.

C. Argument

1. Mr. Ogden relies on excluded evidence.

Mr. Ogden's estoppel argument depends on evidence the district court excluded, both from Mr. Ogden and from Gloria Lang. At trial, Mr. Ogden testified to interactions he had with City employees in 1999 and 2001. (Tr. Ogden, p.94 Line 9-p.101 Line 18 App. 207-214.) He argues that because the City did not tell him during those interactions that Oak Hill Mobile Home Park violated zoning ordinances, the City cannot now enforce the violations against him.

This testimony was excluded by the district court. The City objected to this testimony because the City had asked during discovery for information on any statements or admissions made by City officials related to the case, and Mr. Ogden had failed to disclose these interactions. (Tr. DeSmet, p.97 Lines 8-16, p.98 Lines 13-15, p.101 Lines 6-16 App. 210,211,214.) The district court excluded this

testimony on the basis of the City's objections. (Ruling, p.2 App. 270.) Mr. Ogden has made no effort in his Proof Brief to argue this ruling was an abuse of discretion. As such, the Court should not consider this evidence in ruling on the appeal.

The district court did not abuse its discretion in excluding the testimony of Gloria Lang. Ms. Lang is a resident of Oak Hill Mobile Home Park and testified at trial. The City objected to her testimony in limine and at trial because she had not been disclosed as a witness during discovery. (City's Second Motion in Limine, ¶¶1-5 App. 021-022; Tr. DeSmet, p.4 Lines 11-18, p.111 Lines 21-24 App. 117,224.) The district court excluded Ms. Lang's testimony: "because Ms. Lang was not disclosed as a witness until the morning of the trial and her testimony was irrelevant to zoning issues, the objection is sustained and her testimony is excluded." (Ruling, p.2 App. 270.) Exclusion of the testimony of a witness not disclosed prior to trial is not an abuse of discretion. *See Sullivan v. Chicago & NW Transp. Co.*, 326 N.W.2d 320, 324-25 (Iowa 1982) (finding no abuse of discretion in exclusion of witness disclosed three weeks prior to trial). Ms. Lang was not disclosed as a witness until the morning of trial.

Mr. Ogden argues the district court was wrong to exclude Ms. Lang's testimony. He argues that her testimony was relevant because her life would be affected if Oak Hill were closed. (Ogden Brief, p.32.) However, this was not an abuse of discretion as Ms. Lang presented no testimony relevant to whether Oak Hill

complied with the City's past or present zoning ordinances. Mr. Ogden fails to even address the lack of disclosure as a basis for exclusion. The district court did not abuse its discretion in excluding Ms. Lang's testimony.[2]

2. Estoppel does not apply to the City.

The City is not estopped from enforcing its zoning ordinance against Mr. Ogden. Generally, "estoppel does not lie against government agencies except in exceptional circumstances." *Bailiff v. Adams County Conference Bd.*, 650 N.W.2d 621, 626-27 (Iowa 2002). "A party seeking to invoke the doctrine of estoppel against a public body bears a heavy burden, particularly when the government acts in a sovereign or governmental role rather than a proprietary role." *Id.* (internal citation and quotation omitted).

No exceptional circumstances exist warranting application of this doctrine to the City. Zoning laws are enacted for the protection of the public, and public policy favors their enforcement. Only the passage of time and the lack of past enforcement suggest any basis for estoppel. A lack of past enforcement should not prevent current enforcement. As one court has said "A public officer's failure to correctly administer

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[2] If considered, the most relevant portion of Ms. Lang's testimony relates to Mr. Ogden's credibility. Ms. Lang testified that she learned about the City's case against Oak Hill two days before trial. (Tr. Lang, p.115 Lines 17-19 App. 228) This directly contradicts Mr. Ogden's testimony that he had kept all of Oak Hill's residents informed about the City's case since it began. (Tr. Ogden, p.105 Line 18-p.106 Line 2 App. 118-119.)

the law does not prevent a more diligent and efficient officer's proper administration of the law." *Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 265 S.W.3d 190, 195 (Ky. 2014). The Court need not consider the merits of the estoppel defense as it does not apply to the City.

3. Mr. Ogden has not met his burden to prove estoppel is a defense to this case.

On the merits, estoppel must be proved by clear and convincing evidence and requires

> (1) a false representation or concealment of material fact by the city, (2) a lack of knowledge of the true facts by [Defendant], (3) the city's intention the representation be acted upon, and (4) reliance upon the representations by [Defendant to his] prejudice and injury.

City of Marshalltown v. Reyerson, 535 N.W.2d 135, 137 (Iowa Ct. App. 1995). Mr. Ogden would fail several elements.

The record lacks evidence of a false representation by the City. The City represented in the 1955 Certificate of Occupancy that the property complied with the zoning ordinances that existed. Since then, there has been no representation that the property complied with the 1955 or any other zoning ordinances. The 2003 letter notes only that a certificate of occupancy was issued in 1955 and does not represent that the property still complied with the 1955 ordinances. Mr. Ogden cannot establish a false representation or concealment of a material fact. Even if such a

statement had been made, Mr. Ogden also has no evidence the City intended him to rely upon it.

Mr. Ogden also has no evidence of reliance to his prejudice. There is no evidence he has made any improvements to or investments in Oak Hill Mobile Home Park on the basis of any representations by the City. Additionally, the evidence demonstrates that the property has not complied since 1963. Rather than prejudice, the owners of the property, including Mr. Ogden, have benefited from the lack of enforcement by continuing to collect rents from residents without having to put money into bringing the property into compliance with the City's ordinances. The passage of time alone creates no inference of prejudice. *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979).

Mr. Ogden inaccurately argues "If there were any safety issues over the past 77 years, there would have been at least ONE safety code citation—but there have been none." (Ogden Brief, p.36.) The testimony was excluded, but Mr. Ogden testified that in 1999 the City required him to correct electrical issues. (Tr. Ogden, p.96 Line 19-p.97 Line 7 App. 209-210.) Updating electrical equipment is a safety issue. Additionally, the pictures in City's exhibits 13-17 all represent instances in which the City issued junk and debris cleanup notices to enhance the health and safety of Oak Hill. The Court may also take judicial notice of Polk County case number EQCE078654 in which the City sued Mr. Ogden because one of the trailers

at Oak Hill was a public nuisance. Saying that the City has taken no action to enhance the safety of 3140 Indianola Avenue in 77 years is simply not true.

Mr. Ogden has not meet the burden to show by clear and convincing evidence he has been prejudiced. He has not met the heavy burden of showing estoppel lies against the City.

III. The Court should not grant Amici's requested relief.

A. Issue Preservation

Amici's brief relies on several sources of information outside the record. Aside from the few citations to the record, the cases, statutes, and rules cited by Amici, all of the Other Authorities cited by Amici are factual sources not included in the record before the district court. The Court should decline to consider them.

B. Scope and Standard of Review

The standard of review is not relevant to Amici's arguments.

C. Argument

Amici ask this Court to reverse the district court decision. While they make some legal argument to this effect, their primary position is that the closure of Oak Hill Mobile Home Park will be more harmful to the residents than allowing the park to stay open. This is not an appropriate consideration for the Court. This Court should consider whether the City prevailed on the law and proved that usage of 3140

Indianola Avenue is no longer a legal non-conforming use. Whether or not the City should enforce its zoning ordinances is a policy question for the Des Moines City Council.

More specifically, Amici argue that the City could address matters by targeting specific nuisances on the property rather than addressing the property's zoning violation. (Amici Proof Brief, pp.14-16.) The City has done this. As discussed above, the pictures in City's exhibits 13-17 all represent instances in which the City issued junk and debris cleanup notices, and the City recently brought a nuisance action against Mr. Ogden in Polk County case number EQCE078654.

Regarding this case, Ms. Donovan sent Mr. Ogden a detailed letter in August 2014 identifying what zoning violations existed. (Ex. 20, App. 101.) It would not have been difficult for Mr. Ogden to apply the criteria in the letter to Oak Hill and identify the violations. Ms. Donovan did so at trial and identified dozens of violations. (Tr. Donovan, p.39 Line 3-p.63 Line 11 App. 152-176; Ex. 6, pp.2-4, 10, 14-15, 21-24, 27-30, 34-37 App. 033-034,041,045-046,052-055,058-061,065-068; Ex. 13, App. 089-090; Ex. 14, App. 091; Ex. 15, pp.1-2 App. 092; Ex. 16, App. 093; Ex. 17, pp.1-2 App. 094-095; Ex. 18, pp.1-4 App. 096-099; Ex. 19, App. 100.) Mr. Ogden could have addressed those violations before the March 2016 trial, but did not.

Amici also argue that identifying specific violations, which has now been done, would allow removal of offending steps, porches, and additions. Doing so would not remedy all violations at Oak Hill as the main bodies of several trailers would still violate the 1955 zoning ordinance's setback and separation requirements.

While Amici would like the City to have taken different actions, they cannot argue away the fact that Oak Hill Mobile Home Park violates many requirements of the 1955 ordinances that allowed its legal use. The property has lost its right to continue as a legal non-conforming use. The repeated need for the City to address nuisances, junk and debris, and zoning violations at 3140 Indianola Avenue make Mr. Ogden "a landlord who neglects or abandons urban properties;" the definition of a slumlord. The New Lexicon Webster's Dictionary of the English Language 936 (Bernard S. Cayne et al. eds., 1989 ed.). Mr. Ogden and his predecessors have exploited residents by taking their money so they could live in a mobile home park that is unsafe and in violation of City ordinances.

CONCLUSION

The Court should affirm the district court holding that Mark Ogden has lost the right to operate a mobile home park at 3140 Indianola Avenue as a legal non-conforming use of the property. The district court appropriately held that legal non-conforming use rights have been lost because the conditions at Oak Hill present health and safety dangers to residents, firefighters, and police officers. Alternatively,

the Court can affirm the district court because Oak Hill's use expanded beyond what was lawfully allowed in 1955. Because the mobile home park no longer conforms to what was allowed for such properties in 1955, it has lost the right to continue operating as lawful under that ordinance. Mr. Ogden has not met the burden to prove that an estoppel defense can be raised against the City, let alone succeed. The district court ruling should be affirmed.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument only if Appellant's request for oral argument is granted.

Respectfully submitted,

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CERTIFICATES

Compliance with Type-Volume Limitation, Typeface Requirements and Type-Styles Requirements.

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 7,371 words.

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirement for Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 point font.

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Filing. On December 2, 2016, this Brief was filed with the Clerk of the Iowa Supreme Court by filing it on the Appellate Court EDMS system, and a copy of the same was sent to Appellant's attorney via EDMS.

/s/ Luke DeSmet
Luke DeSmet